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Supreme Court of the United States

October Term, 1962

No. 1026

STANLEY BLUMENTHAL, RUDOLPH WILLIAM JONES and WAYNE P. PASCHAL,

Petitioners,

against

UNITED STATES OF AMERICA and THE FEDERAL COMMUNICATIONS COMMISSION.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

One would never know, from a reading of respondents' brief, that petitioners' principal reliance is placed upon the decisions of this Court in *Kent* v. *Dulles*, 357 U. S. 116 and *Greene* v. *McElroy*, 360 U. S. 474. Those cases are not even mentioned by respondents nor is the principle for which they stand disgussed. The only possible reference to what we consider to be the central issue raised by the Petition is in the last paragraph of respondents' brief where reference is made to the Court of Appeals opinion in *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666, at 670,

and to the briefs in opposition to the Petition for Certiorari in *Borrow*, No. 403, 1960 Term, pp. 19-20. But the majority opinion of the Court of Appeals in *Borrow* does not mention the *Kent* or *Greene* cases either; those cases are discussed only in the dissenting opinion of Judge Washington in *Borrow*, with which Judge Bazelon agreed in the instant case (see Petition for Certiorari, p. 23). 'Respondents' brief in opposition in the *Borrow* case, which is apparently incorporated in their present brief by reference, disposes of the *Kent* and *Greene* cases in a most cavalier and offhand fashion.

The vague statutory language [§ 303(1) of the Communications Act] upon which the respondents evidently rely provides no stronger foundation for the conduct of the Commission than did similarly general language relied upon by the Government in the *Kent* and *Greene* cases. See dissenting opinions in those cases.

II

Moreover, the Commission for 24 years after its creation recognized that § 303(1) did *not* give it authority to engage in political screening. The legislative material called to the attention of the Court at pages 9-11 of the Petition makes this abundantly clear. The respondents make no answer except to call attention to the position taken by the Commission in 1958. We agree that by 1958 the Commission's attitude had changed. That was the year in which the political questionnaire was submitted to Borrow and Cronan. But if the Commission had no legislative power to establish a political test in 1938, 1940 and 1941 (see Petition, pp. 9-11), the power could not have been created by the Commission's adoption of the program which gave rise to the litigation here under consideration.

III

Respondents make much of the "strategic position" occupied by Commission-licensed operators (Brief, p. 9). The same argument was made with equal intensity by the Government in *Kent* and *Greene*. "Examination of the Government's brief in the *Kent* case will disclose that the most dire consequences were predicted if the Secretary of State were denied the right to screen passport applications. And it will be recalled that Greene was Chief Executive Officer of a firm "whose business was devoted wholly to defense contracts with the United States" (360 U. S. at 511). Furthermore, it is difficult to see how the argument would apply to Paschal, who seeks only an amateur's license.

If, as we urge, the Commission had no statutory power to enact a political test, we cannot see how the nature of petitioners' work can affect the situation.

IV

Respondents persist in treating petitioners' "refusal * * * to furnish the relevant information" (Respondents' Brief, p. 12) in a formalistic and mechanical fashion, almost as though the petitioners were refusing to furnish their address or age. As we pointed out in the Petition (p. 12), this Court has long recognized the effect of such political questionnaires on the free exercise of rights in our democratic society. The particular question at issue here cannot be treated in a routine fashion; whatever rationalization may be adopted, the effect is to penalize those who seek to protest their privacy for the reasons stated by this Court in the cases cited in the Petition, and elsewhere.

This Court has, so far as we know, not passed on this issue in any case in which a suitor sought to exercise a constitutional right—in this case the right to engage in a lawful occupation. For that reason, if for none other, the Court should grant the Petition.

Respectfully submitted,

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May 23, 1963.